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IN THE

SUPREME COURT OF THE UNITED STATES

SPONSE NOT PRINTED OCTOBER TERM, 1969

WALTER E. CRAVEN, Warden,
Folsom State Prison,
Petitioner,

v.

FORREST SILVA TUCKER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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OCTOBER TERM, 1969

WALTER E. CRAVEN, Warden,
Folsom State Prison,
Petitioner,

v.

FORREST SILVA TUCKER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on January 28, 1970.

OPINIONS BELOW

The memorandum opinion of the United States District Court, Eastern District of California, is printed in Appendix A hereto. The opinion of the Circuit Court, printed in Appendix B hereto, is reported in 419 F.2d ____. The opinion of the state court in its review of the case on direct appeal is

reported in *People* v. *Tucker* (1954) 127 Cal.App. 2d 436, 273 P.2d 934. In a subsequent habeas corpus proceeding in the California Supreme Court (*In re Tucker* (1966) 64 Cal.2d 15, 48 Cal.Rptr. 697, 409 P.2d 921) the determination of habitual criminality was ordered to be redetermined by the sentencing court and the case was remanded to the Alameda County Superior Court for this purpose. That court, following a hearing, determined that Tucker was not represented by counsel at the time of the prior convictions and had not waived counsel; the priors were ordered stricken from the indictment and from the verdict and the determination of habitual criminality was ordered set aside.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 28, 1970. A petition for rehearing and rehearing en banc was filed by the appellee, Walter E. Craven, on February 10, 1970. This petition was denied March 19, 1970.

QUESTIONS PRESENTED

1. Does *Burgett* error (*Burgett* v. *Texas* (1967) 389 U.S. 109), in the admission of evidence of a constitutionally infirm prior conviction in a case where independent evidence of guilt is overwhelming, compel the vacating of a final state court judgment by a federal court without any resort to the harmless error rule of *Chapman* v. *California* (1967) 386 U.S. 18?

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2. Does the decision in *Burgett* v. *Texas* require its retroactive application by federal courts in collateral attacks on state court judgments which were final years prior to the *Burgett* decision?

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix C. They are:

Sixth Amendment of the United States Constitution.

Fourteenth Amendment of the United States Constitution.

California Penal Code sections 969, 969b.

STATEMENT

A. Proceedings In Federal Courts.

Respondent filed in a petition for a writ of habeas corpus in the United States District Court for the Eastern District of California on September 9, 1968, alleging, among other things, that his state conviction was based upon evidence of prior convictions that were constitutionally invalid in that he had been denied his right to counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The District Court issued its memorandum and order denying the petition for writ of habeas corpus on September 10, 1968.

The District Court denied a certificate of probable cause on September 20, 1968. The Ninth Circuit Court of Appeals granted a certificate of probable cause to appeal and authorized respondent to proceed in forma pauperis on October 29, 1968.

The record on appeal was timely prepared and filed with the Ninth Circuit Court of Appeals. Briefs were filed and the matter was submitted without oral argument. The decision of the Ninth Circuit Court reversed the District Court and remanded the case to the District Court. This order was entered on January 28, 1970. In so doing, the Circuit Court held that evidence of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon* v. *Wainwright* (1963) 372 U.S. 335, is inherently prejudicial and requires the state to grant a new trial or dismiss the charges and failed to apply a harmless error rule to such situation.

B. The State Court Proceedings and Post-Conviction Actions.

The state court judgment resulted from Tucker's conviction on four counts of robbery in the Alameda County Superior Court. On appeal to the Court of Appeal for the First Appellate District, that court modified the judgment by ordering the terms of the several sentences to run concurrently and affirmed the judgment as modified, the case being reported as *People* v. *Tucker, supra,* 127 Cal.App.2d 436. A petition for rehearing was denied September 30, 1954. No petition for hearing in the California Supreme Court was filed and no petition for certiorari to review the decision of the Court of Appeal was filed.

On September 29, 1964, respondent filed a petition for writ of habeas corpus with the California Supreme Court, Crim. 8251, alleging the constitutional

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invalidity of the prior convictions in the light of *Gideon* v. *Wainwright, supra,* and attacking the validity of the determination of habitual criminality. In the case reported as *In re Tucker, supra,* 64 Cal.2d 15, the California Supreme Court granted the writ "insofar as relief is sought from the prior determination of habitual criminality, and the Superior Court of Alameda County is directed to redetermine petitioner's status as an habitual criminal in further proceedings in accordance with the views expressed herein" (64 Cal.2d at p. 21). Pursuant to this order, the Superior Court of Alameda County on June 10, 1966, proceeding No. 25174, found that as to the two prior convictions charged in the indictment "the defendant was neither advised of his right to legal assistance nor did he intelligently and understandingly waive this right to the assistance of counsel"; these two prior convictions were ordered stricken from the indictment and that part of the verdict filed on November 27, 1953, finding the first and second prior convictions to be true was vacated and set aside; further, the determination of habitual criminality was set aside.

FACTUAL STATEMENT

A. Count I.

At approximately 1:30 p.m. on the afternoon of February 7, 1952, Sydney Fey and Mildred Schmelz, employees of the Guaranty Building and Loan, 1759 Broadway, Oakland, California, were alone when the premises was entered by two armed men and robbed

of $2,211.42. Mr. Fey testified that a man, Tucker, entered and when Fey went to meet the man to discuss business with him, he, Fey, observed that he had a gun (RT 291). Tucker was not masked and Fey got a good look at him over a three-minute period (RT 292, 294). Fey made an in-court identification of respondent Tucker as one of the robbers.

Mrs. Schmelz testified that Tucker had been in the premises the day before, February 6, 1952, and when he entered on February 7 she recognized him from the previous visit. She had been suspicious of him because of the nervous way he was acting and because he was wearing gloves, which she considered unusual, and so looked at him "very thoroughly" (RT 305). She told one of the men employees of her suspicions on February 6 (RT 307). She made a positive in-court identification of Tucker as one of the robbers (RT 305–306).

Money wrapped in money wrappers bearing the name of the Guaranty Building and Loan Company was recovered from a safe deposit box rented by Tucker in another bank (RT 318–319, 321). These wrappers were identical to the wrappers used by the Guaranty Building and Loan at the time of the robbery (RT 325). Tucker visited this safe deposit box on February 7, the day of the robbery (RT 316).

Codefendant Bellew was identified as the other robber (RT 303).

B. Count II.

The East Oakland Office of the Anglo-California National Bank was held up on the afternoon of February 27, 1952, and robbed of $24,042. Two armed men

participated in this robbery. A customer observed one of the robbers in a customer line without a mask over his face, observed him leap over the counter with a gun in his hand and participate in the robbery. She made a positive in-court identification of Tucker as this man (RT 56). She identified a gun recovered from the glove compartment of Tucker's automobile as being similar to the gun held by him (RT 56, 99).

Codefendant Bellew was identified as the other robber (RT 76).

C. Count III.

The Piedmont Avenue branch of the American Trust Company was held up and robbed on the afternoon of July 22, 1952, by two armed men. A customer positively identified Tucker as one of the robbers (RT 105); this customer took particular notice of Tucker because she thought he was going to take her place in line; he was not wearing a mask; she was very close to him and could see him very clearly (RT 105, 108); he had a glove on one hand only and had a wedding ring on the other hand, his left hand (RT 109). Tucker wore a wedding ring (RT 117).

$26,833.29 was taken during this robbery (RT 130), including mutilated bills in denominations of ones, twos, fives, tens, and twenties (RT 122). Bills of this description were subsequently recovered from a safe deposit box rented by Tucker under the name of Ralph Pruitt (RT 247, 261). Tucker had visited this safe deposit box on the day following the robbery and exchanged a small safe deposit box for a large one (RT 253).

In addition to the eyewitness identification of Tucker as one of the robbers and the money recovered from his safe deposit box, a palm print found on the counter inside a teller's window was identified as Tucker's (RT 274, 275). This print had twenty-seven points of similarity with Tucker's print; only twelve points of similarity are required for identification (RT 277). A heel print found on the inside counter of the teller's desk was identified as having been made by Tucker's shoe (RT 134, 266–269).

D. Count IV.

On January 20, 1953, the Boulevard-Fairfax branch of the Bank of America was held up and robbed of $15,589 by two armed men. An employee identified Tucker as resembling one of the robbers (RT 329, 330); she noted in particular his ears (RT 335). A customer identified Tucker as one of the robbers; she was about a foot and a half distant from him during the robbery (RT 339, 340). Another employee observed one of the robbers jump up over the counter with a gun in his hand; she identified Tucker as resembling that man (RT 354, 356).

A heel print discovered at the bank was identified as being similar to the heel print found at the American Trust Company following that robbery and with the heel print of Tucker's shoe (RT 369–372).

It was established further that Tucker visited a safe deposit box rented by him under the name of Ralph Pruitt on January 20, 1953, at 6:12 p.m. (RT 254.)

E. Other Evidence.

In addition to the above evidence concerning the specific charges against Tucker, evidence was introduced of an armed robbery in Los Angeles of the Security First National Bank on March 6, 1953, by two armed men following which Tucker and codefendant Bellew were apprehended. Tucker was positively identified as one of the robbers of the First National Bank (RT 156–160). The evidence clearly established a common *modus operandi* as to the four Alameda County robberies and the Los Angeles robbery.

F. The Trial.

Tucker entered a plea of innocent and denied the priors; he did not testify at the trial. Documentary evidence of the two prior out-of-state convictions was introduced without objection (RT 408–409). This showed a 1938 Florida conviction for grand larceny and a 1946 Louisiana burglary conviction (CT 3, 4, 26). The priors were referred to only very briefly during closing argument (RT 462, 485). The very brief reference to the priors in the record indicates the minimal importance they played during the course of the trial.

REASONS FOR GRANTING THE WRIT

A. The Harmless Error Rule Should Apply to Burgett Error.

The court below refused to apply the harmless error principle of *Chapman* v. *California, supra,* 386 U.S. 18. It held that *Burgett* requires a new trial or dis-

missal of the charges whenever evidence of a prior criminal conviction, which is constitutionally infirm under the standards of *Gideon* v. *Wainwright, supra,* 372 U.S. 335, is introduced at the trial. This decision goes beyond *Burgett* and is in direct conflict with the holding in other circuits on this subject.

In holding that a new trial is required on the question of guilt whenever evidence of infirm priors is introduced at trial, regardless of the presence of overwhelming evidence of guilt in the record, the court below has misinterpreted this Court's decision in *Burgett* and has greatly broadened the holding of that case. This is so because in *Burgett* the court did not hold that such error could never be deemed harmless error in a case where the facts overwhelmingly support such a conclusion and where it appears that the defendant received a fair trial.

In *Burgett* the trial court tentatively admitted four invalid prior convictions solely for sentencing purposes, as was done in the instant case. At the end of the testimony the Texas trial judge instructed the jury not to consider these alleged prior offenses for any purpose whatever. Convicted of assault as charged, the accused was sentenced as a first offender. The Texas Court of Criminal Appeals affirmed the decision, but this Court, distinguishing *Spencer* v. *Texas* (1967) 385 U.S. 554, reversed, holding that the invalidity of the prior convictions destroyed any viable state interest in the introduction of those priors. The court reasoned: "The admission of a prior

criminal conviction which is constitutionally infirm under the standards of *Gideon* v. *Wainwright* is inherently prejudicial", and added "we are unable to say that the instruction to disregard it made the constitutional error 'harmless beyond a reasonable doubt' within the meaning of *Chapman* v. *California* . . ." (Footnote omitted.) (*Burgett* v. *Texas, supra,* at p. 115.)

This Court's description of the error in *Burgett* as inherently prejudicial, it is submitted, does not mean that it can never be found "harmless beyond a reasonable doubt" within the meaning of *Chapman,* because the *Chapman* test was apparently applied in *Burgett.* This Court did not state that because the error was inherently prejudicial it could never be deemed harmless but, rather, "we are unable to say that the instruction to disregard it made the constitutional error 'harmless beyond a reasonable doubt' . . ." By implication it follows that on another record presenting appropriate facts it could be concluded that such error was harmless.

The Third Circuit in *United States ex rel Bolish* v. *Maroney* (1969) 409 F.2d 1404, applied the test of *Chapman* in distinguishing *Burgett.*

The Fifth Circuit in *Beto* v. *Stacks* (1969) 408 F.2d 313, affirmed the lower court holding granting relief under *Burgett* but recognized that in a proper case the application of the *Chapman* rule would apply to the determination of a new trial.

See also *Tucker* v. *United States* (N.D. Calif. 1969) 299 F.Supp. 1376, holding that the use of constitutionally invalid prior convictions on cross examination for impeachment purposes was error but the error was harmless under *Chapman.*

The California Supreme Court has held that the use of an invalid prior conviction to impeach an accused testifying in his own defense is not prejudicial per se and therefore does not necessarily constitute reversible error. *In re Dabney* (1969) 71 A.C. 1. In discussing the rule of *Burgett,* the California court concluded that such error, although "inherently prejudicial" could nevertheless be deemed harmless under *Chapman* in an appropriate case presenting facts warranting such a conclusion.

In the recent case of *Harrington* v. *California* (1969) 395 U.S. 250, this Court held that under the test of the *Chapman* case, *Bruton* error (*Bruton* v. *United States* (1968) 391 U.S. 123) may be considered harmless where the evidence presented by the prosecution was overwhelming and the confessions did not have a devastating impact upon defendant's defense. The court in *Harrington* stated (at p. 254):

> "We do not depart from *Chapman;* nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of

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Bruton can constitute harmless error, we must leave this state conviction undisturbed."

It is submitted that a similar rule should apply to cases involving *Burgett* error and that where the independent evidence of guilt in the record is overwhelming the rule of *Chapman* should apply.

Any *Burgett* error herein was harmless. The court below proceeded upon the basis that *Burgett* error was prejudicial per se and so did not consider the other evidence of guilt in the record, although the record was before it.[1]

In none of the many attacks respondent has made upon his judgment of conviction, including the direct appeal and the seven collateral attacks on the judgment has he at any time contended that there was insufficient evidence of guilt. Thus, the California Court of Appeal in affirming (as modified) the judgment of conviction stated:

> "His appeal rests solely on the ground that these sentences should be concurrent, and concurrent with any other sentence, federal or state, theretofore imposed. No question as to the conduct of the trial or as to the sufficiency of the evidence is raised." (*People* v. *Tucker, supra,* 127 Cal.App.2d 436, 437.)

In each of the four counts Tucker was identified as one of the robbers by an eyewitness who was present during the robbery and had adequate opportunity to observe him. In Count I, he had been in the prem-

[1] The Hearing Reporter's Transcript and the Clerk's Transcript of the state court proceedings were lodged with the court below. They are lodged with this Court herewith.

ises on the day preceding the robbery and because of his suspicious appearance the witness had taken particular notice of him and recognized him when he entered the following day and participated in the robbery. Further, money wrappers bearing the stamp of the victim Guaranty Building and Loan were found in Tucker's safe deposit box.

Concerning Count II, in addition to the eyewitness identification of Tucker, the witness identified a gun recovered from his automobile as being similar to the gun held by the robber.

As to Count III, in addition to the eyewitness identification, the witness testified that the robber wore a wedding ring (Tucker wore a wedding ring); mutilated bills of the denominations taken during the robbery were subsequently discovered in Tucker's safe deposit box; Tucker had visited this safe deposit box on the day following the robbery; Tucker's palm print was found inside a teller's window and a heel print matching the heel of Tucker's shoe was found on the trust company premises.

As to Count IV, in addition to the eyewitness identification of Tucker, a heel print discovered at the bank was identified as being similar to the heel print found in the American Trust Company following that robbery and with the heel print of Tucker's shoe.

Other evidence, set forth hereinabove, connects Tucker with these robberies. The court's observation in *Harrington* is certainly applicable to this case. The case against Tucker was not woven from circumstantial evidence. It is so overwhelming that unless it

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is held that no violation of *Burgett* can constitute harmless error, the state conviction must be left undisturbed.

B. The Decision of Burgett Should Not Receive Full Retrospective Application

The Constitution neither requires nor prohibits rigid retroactive application of all new developments in constitutional law. *Linkletter* v. *Walker* (1965) 381 U.S. 618, 629, 14 L.Ed.2d 601, 608, 85 S.Ct. 1731. In deciding whether to apply *Burgett* retroactively, this Court should consider the three criteria recently reiterated in *Stovall* v. *Denno* (1967) 388 U.S. 293, 297, 18 L.Ed.2d 1199, 1203, 87 S.Ct. 1967: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

(a) *Purpose of the Burgett rule.*

One purpose of the rule of *Burgett,* as stated in the opinion, is to prevent erosion of *Gideon* by protecting the accused from suffering anew from the initial deprivation of his Sixth Amendment right. But the exclusion of invalid priors is also aimed at protecting the fairness of the second trial. The requirement of counsel established by *Gideon* v. *Wainwright, supra,* 372 U.S. 335, receives full retroactive effect because "[t]he basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal

trial . . . is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent." (*Tehan* v. *Shott* (1966) 382 U.S. 406, 416 [15 L.Ed.2d 453, 560, 86 S.Ct. 459].) In no case where the fairness of the trial is unaffected should *Burgett* be retroactively applied.

(b) *Reliance on previous standards.*

California Penal Code section 969 provides for charging defendant with a prior felony conviction. Section 969b provides that official records, properly certified, constitute prima facie evidence of the fact of conviction. Pursuant to this authority, prosecutor's have in the past introduced at trial prior convictions, some of which were invalid under *Gideon*, without attempting to ascertain the constitutional validity of those priors. Unlimited retroactivity would compel the court to hold hearings as to the validity of priors in a multitude of cases involving the most hardened criminals.

(c) *Administration of justice.*

Most significantly, unlimited retroactivity would impose grave burdens on the administration of criminal justice. It would result in "the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." (*Johnson* v. *New Jersey* (1966) 384 U.S. 719, 731.)

And in *Stovall* v. *Denno, supra,* 388 U.S. 293, 300, the court expresses its concern on the question of retroactive application of the new "lineup rules":

"In *Tehan* v. *Shott, supra,* we thought it persuasive against retroactive application of the no-comment rule of *Griffin* v. *California,* 380 U.S. 609, that such application would have a serious impact on the six States that allowed comments on an accused's failure to take the stand. We said, 'To require all of those States now to void the conviction of every prisoner who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration.' 382 U.S., at 419. That impact is insignificant compared to the impact to be expected from retroactivity of the *Wade* and *Gilbert* rules. At the very least, the processing of current criminal calendars would be disrupted while hearings were conducted to determine taint, if any, in identification evidence, and whether in any event the admission of the evidence was harmless error. Doubtless, too, inquiry would be handicapped by the unavailability of witnesses and dim memories. . . ." (*Stovall* v. *Denno, supra,* 388 U.S. 293, 300.)

A retroactive application of *Burgett* would be devastating in its impact upon the administration of justice. It would require a general release of prisoners of undoubted guilt, serving lengthy sentences imposed long ago and with little possibility of successful retrial. It is submitted that the application of *Burgett*

be restricted to those cases which became final after the date of that decision, November 13, 1967.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX A

IN THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

FORREST S. TUCKER,
Petitioner,
vs.
WALTER E. CRAVEN, Warden
Folsom State Prison,
Respondent.

Civil No. S-948

MEMORANDUM AND ORDER

Petitioner has filed with this Court a petition for a writ of habeas corpus, challenging his custody by the Warden of the California State Prison at Folsom. In the year 1953, petitioner was found guilty on four counts of armed robbery, and was also found to have served two prior felony convictions. As a result he was adjudged to be an habitual criminal, according to California Penal Code § 644. Petitioner appealed and his convictions were affirmed (See: *People v. Tucker,* 127 Cal.App.2d 436).

Petitioner complains that the trial court erred in finding that he had suffered the prior felony convictions and further complains of the judgment that he was an habitual criminal. The record shows that the California courts have corrected these errors so that there is no validity to the complaints now made by petitioner.

In any event the errors at the trial involved matters of state law, and as such are not cognizable in a fed-

eral habeas corpus proceeding. This is especially true where the defendant was accorded a fair trial despite the alleged errors (See: *Nolen v. Wilson,* 372 F.2d 15; and see also *Beck v. Washington,* 369 U.S. 541; and *Leland v. Oregon,* 343 U.S. 790).

Petitioner states he was denied certain constitutional rights at his trial, but he does not state in what way his rights were violated. This statement must be classed as no more than a legal conclusion; it is not the statement of a fact. A petition for a writ of habeas corpus must contain a sufficient allegation of facts (*Schlette v. California,* 284 F.2d 827) in order for it to be considered by this Court.

From the foregoing it is apparent that as a matter of law petitioner is not entitled to the relief he seeks from this Court.

IT IS, THEREFORE, ORDERED that petitioner's petition for a writ of habeas corpus be, and the same is, hereby denied.

DATED: September 10, 1968.

SHERRILL HALBERT
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FORREST S. TUCKER, *Appellant,* vs. WALTER E. CRAVEN, Warden Folsom State Prison, *Appellee.*	No. 23,478

[January 28, 1970]

On Appeal from the United States District Court
Eastern District of California

Before: BARNES, CARTER and HUFSTEDLER, Circuit Judges

JAMES M. CARTER, Circuit Judge:

Appellant appeals from an order of the district court denying his petition for writ of habeas corpus. In his briefs, he challenges two convictions, each involving various counts of robbery, resulting from prosecutions in the California state court in Alameda County, in cases Nos. 25174 and 25175. He makes two contentions, both raised below. The same contentions

had been previously raised and decided adversely to him in the state courts. The contentions are:

1. The jury in case No. 25174 was improperly informed of appellant's constitutionally invalid state convictions in Florida and Louisiana; and

2. The district court erred in failing to consider other constitutional errors, particularly the adequacy of representation by trial counsel. The district court held these matters involved only state law and were not cognizable in a federal habeas corpus proceeding.

After the briefs were filed, petitioner wrote the Court and abandoned his contentions as to the convictions growing out of case No. 25175 with the result that only the convictions under case No. 25174 are before us.

The indictment in case No. 25174 charged various counts of robbery and two prior felony convictions, grand larceny in Florida, and burglary in Louisiana. Appellant denied the two priors and entered a plea of not guilty to the robbery charges. A jury heard the evidence on both the issue of guilt and the validity of the two priors. They found against appellant on both issues. Petitioner was then held to be an habitual criminal within the meaning of California Penal Code 644(a). Sentence was entered accordingly.

Various procedings were thereafter had in the state and federal courts. Finally in case of *In re Tucker*, 64 Cal.2d 15 (1966) the California Supreme Court granted a writ "insofar as relief is sought from the prior determination of habitual criminality, and the Superior Court of Alameda County as directed to redetermine petitioner's status as an habitual criminal in further proceedings in accordance with the views expressed herein." [page 21]. The Alameda Superior Court, after an evidentiary hearing, found that as to

the two prior convictions charged in the indictment "the defendant was neither advised of his right to legal assistance nor did he intelligently and understandingly waive this right to the assistance of counsel." The two prior convictions were ordered stricken from indictment, that part of the verdict finding the first and second convictions to be true was set aside and the determination of habitual criminality was set aside.

Appellant contends that the introduction of the invalid priors tainted the jury's determination of his guilt as to the four robbery counts. He cites *Burgett v. Texas*, 389 U.S. 109 (197) as controlling authority for his position. The State of California takes the position that appellant has received all the relief to which he is entitled. It bases its argument on *Spencer v. Texas*, 385 U.S. 554 (1967), a case allowing the use of prior conviction under a Texas recidivist statute.

A reading of the two cases convinces us that Tucker's claim for relief is governed by *Burgett v. Texas,* supra. There the Supreme Court held:

> "To permit a conviction obtained in violation of *Gideon v. Wainwright* [372 U.S. 335], to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. . . . The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright,* is inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error 'harmless beyond a reasonable doubt' within the meaning of *Chapman v. California,* 386 U.S. 18." [page 115].

Burgett went on to observe that *Spencer v. Texas,* supra, "is not relevant to our present problem." In *Spencer* the "prior convictions were not presumptively void.", *Burgett,* page 115, since no specific federal right had been violated in securing the prior convictions. In sharp contrast *Burgett* and the case at bar involved a violation of one of the most well-defined of federal rights, the right to counsel.

The judgment of the district court must be reversed and the matter remanded to enable that court to fashion procedures to be followed below. The finding of the State court that appellant was without counsel at the time of his conviction on the two prior felonies disposes of that issue. The district court may desire to conditionally grant the writ, that is, provide that a writ will be granted unless the State within a reasonable time, to be fixed by the district court, sets aside the verdict and sentence in No. 25174 and either grants the appellant a new trial on those charges or dismisses the indictment.

Our disposition of the case makes it unnecessary to consider appellant's second contention.

Reversed and remanded.

APPENDIX C

California Penal Code

Section 969: In charging the fact of a previous conviction of felony, or of an attempt to commit an offense which, if perpetrated, would have been a felony, or of theft, it is sufficient to state, "That the defendant, before the commission of the offense charged herein, was in (giving the title of the court in which the conviction was had) convicted of a felony (or attempt, etc., or of theft)." If more than one previous conviction is charged, the date of the judgment upon each conviction may be stated, and all known previous convictions, whether in this State or elsewhere, must be charged.

Section 969b: For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this State has been convicted of an act punishable by imprisonment in a state prison, county jail or city jail of this State, and has served a term therefor in any penal institution, or has been convicted of an act in any other state, which would be punishable as a crime in this State, and has served a term therefor in any state penitentiary, reformatory, county jail or city jail, or has been convicted of an act declared to be a crime by any act or law of the United States, and has served a term therefor in any penal institution, the records or copies of records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence.

United States Constitution

AMENDMENT VI: *Mode of Trial in Criminal Proceedings*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV: *Citizenship, Representation, and Payment of Public Debt*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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